

1 J. CHRISTOPHER JACZKO (149317)
JACZKO LAW GROUP, APC
2 4401 Eastgate Mall
San Diego, CA 92121
3 Telephone: (858) 404-9206
Facsimile: (858) 225-3500
4 chris@jaczkolaw.com

5 MICHAEL C. RICHARDS (To Be Admitted *Pro Hac Vice*)
EMILY E. HARRIS (To Be Admitted *Pro Hac Vice*)
6 DAVIS, BROWN, KOEHN, SHORS & ROBERTS, PC
The Davis Brown Tower
7 215 10th Street, Suite 1300
Des Moines, IA 50309
8 Telephone: (515) 288-2500
Facsimile: (515) 243-0654

9 Attorneys for Defendant, Counterclaimant and
10 Third-Party Plaintiff
TSI HEALTH SCIENCES, INC.

11
12 **UNITED STATES DISTRICT COURT**
13 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

14 GOLDEN STATE NATURAL
PRODUCTS, INC.,

15 Plaintiff,

16 v.

17 TSI HEALTH SCIENCES, INC.,

18 Defendant.

No. '13CV0337 JAH KSC

**ANSWER TO COMPLAINT,
COUNTERCLAIM, AND THIRD
PARTY COMPLAINT**

DEMAND FOR JURY TRIAL

19
20 TSI HEALTH SCIENCES, INC.,

21 Counterclaimant,

22 v.

23 GOLDEN STATE NATURAL
PRODUCTS, INC.,

24 Counterclaim-
25 Defendant.

26
27 (caption continued)
28

1 TSI HEALTH SCIENCES, INC.,
2
3 Third Party Plaintiff,
4 v.
5 APEX ENERGETICS, INC.,
6 Third Party Defendant.
7

8
9
10 TSI (USA) Inc. f/k/a TSI Health Sciences, Inc. (hereafter referred to as “TSI”)
11 for its answer to the Plaintiff’s Complaint for Declaratory Judgment states as follows:

12 **NATURE OF THIS ACTION**

- 13 1. Paragraph 1 lacks any allegations warranting a response.
14 2. TSI lacks sufficient information to comment on the allegations contained
15 in paragraph 2.
16 3. TSI Health Services, Inc. is now TSI (USA) Inc. TSI admits the
17 remaining allegations of paragraph 3.

18 **JURISDICTION AND VENUE**

- 19 4. Paragraph 4 contains legal conclusions that do not require a response. To
20 the extent that a response is required, TSI denies the allegations of paragraph 4.
21 5. Paragraph 5 contains legal conclusions that do not require a response. To
22 the extent that a response is required, TSI denies the allegations of paragraph 5.
23 6. Paragraph 6 contains legal conclusions that do not require a response. To
24 the extent that a response is required, TSI denies the allegations of paragraph 6.
25 7. Paragraph 7 contains legal conclusions that do not require a response. To
26 the extent that a response is required, TSI denies the allegations of paragraph 7.
27 8. Paragraph 8 contains legal conclusions that do not require a response. To
28 the extent that a response is required, TSI denies the allegations of paragraph 8.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

2

3

4

6

8

10

12

13

15

17

18

19

20

21

22

23

24

26

28

1 **SECOND CLAIM FOR RELIEF**

2 **(Declaration of Non-Infringement of the '038 Patent)**

3 25. Paragraph 25 lacks any new allegations warranting a response.

4 26. TSI admits the allegations of paragraph 26.

5 27. TSI admits the allegations of paragraph 27.

6 28. TSI denies the allegations of paragraph 28.

7 29. TSI denies the allegations of paragraph 29.

8 30. Paragraph 30 contains legal conclusions that do not require a response.

9 To the extent that a response is required, TSI denies the allegations of paragraph 30.

10 31. Paragraph 31 contains legal conclusions that do not require a response.

11 To the extent that a response is required, TSI denies the allegations of paragraph 31.

12 **THIRD CLAIM FOR RELIEF**

13 **(Declaration that GSNP is Not In Breach of the License Agreement)**

14 32. Paragraph 32 lacks any new allegations warranting a response.

15 33. TSI admits the allegations of paragraph 33.

16 34. TSI denies the allegations of paragraph 34.

17 35. Paragraph 35 contains legal conclusions that do not require a response.

18 To the extent that a response is required, TSI denies the allegations of paragraph 35.

19 36. Paragraph 36 contains legal conclusions that do not require a response.

20 To the extent that a response is required, TSI denies the allegations of paragraph 36.

21 **COUNTERCLAIMS**

22 TSI, for its Counterclaims against Plaintiff GSNP, alleges:

23 **NATURE OF ACTION**

24 37. This is an action for breach of contract and indirect patent infringement
25 by way of inducement and contributory patent infringement of the TSI-owned and
26 licensed patents, U.S. Patent 7,629,329 issued on December 8, 2009 to Steve S. Lee et
27 al. for "Method for Increasing Muscle Mass and Strength Through Administration of
28 Adenosine Triphosphate," U.S. Patent 7,671,038 entitled "Method of Therapeutic

1 Treatments Including Human Immunodeficiency Virus (HIV) Disease and Other
2 Conditions in a Human Host by Administering Adenine Nucleotides” (issued on
3 March 2, 2010), and U.S. Patent 6,723,737 for “Methods, Pharmaceutical and
4 Therapeutic Compositions for Administering Adenosine,” issued on April 20, 2004.
5 A true and correct copy of U.S. Patent 7,671,038 (the “038 patent”) is attached hereto
6 as Exhibit A and is incorporated herein by this reference.

7 **FIRST COUNTERCLAIM**

8 **(Breach of Contract)**

9 38. GSNP and TSI entered into a License and Supply Agreement
10 (“Agreement”) on June 24, 2009, wherein TSI agreed to grant to GSNP a non-
11 exclusive license to certain patents covering uses of ATP in dietary supplements.

12 39. The Agreement, paragraph 1.2, states that the defined term “Ingredient”
13 “shall include adenosine 5’-triphosphate and adenosine 5’-triphosphate disodium
14 (hereinafter “ATP”) that is administered orally as a Dietary Supplement, resulting
15 from the use of an invention described and claimed in at least one claim of the Letters
16 Patent.”

17 40. The Agreement, paragraph 1.1, states that “Letters Patent...shall include
18 United States patents and any and all patents issuing on patent applications
19 enumerated at Appendix A, and any continuations, continuation-in-part, divisions,
20 patents of addition, reissues or extensions of such patents or patent applications that
21 are owned or licensed by TSI and which TSI has the right to grant licenses thereon to
22 [GSNP] during the term of this Agreement.”

23 41. Appendix A of the Agreement enumerates certain Letters Patent as U.S.
24 Patent 6,723,737 to Eliezer Rapaport for “Methods, Pharmaceutical and Therapeutic
25 Compositions for Administering Adenosine,” issued on April 20, 2004 (the “’737
26 patent”); U.S. Patent 5,227,371 to Eliezer Rapaport for “Utilization of Adenine
27 Nucleotides and/or Adenosine and Inorganic Phosphate for Elevation of Liver, Blood
28 and Blood Plasma Adenosine 5'-Triphosphate Concentrations,” issued on July 13,

1 1993 (the “’371 patent”); U.S. Patent 5,049,372 to Eliezer Rapaport for “Anticancer
2 Activities in a Host by Increasing Blood and Plasma Adenosine 5'-Triphosphate
3 (ATP) Levels,” issued on September 17, 1991 (the “’372 patent”); and U.S. Patent
4 Application Serial Number 10/162,143, which was later issued as a continuation-in-
5 part on December 8, 2009 as U.S. Patent 7,629,329 to Steve S. Lee et al. for “Method
6 for Increasing Muscle Mass and Strength Through Administration of Adenosine
7 Triphosphate” (the “’329 patent”). True and correct copies of the ‘737 patent, ‘371
8 patent, ‘372 patent, and ‘329 patent, are attached hereto as Exhibits “B”, “C”, “D”,
9 and “E”, respectively, and are incorporated herein by this reference as though set forth
10 in full. The aforementioned ‘038 patent together with the ‘737 patent, ‘371 patent,
11 ‘372 patent and ‘329 patent are collectively referred to hereinbelow as the “TSI
12 Patents”.

13 42. Each of these patents-in-suit relates to the oral administration of ATP to
14 persons in need thereof, for the improvement of musculoskeletal function, the
15 development of muscle mass, and the treatment of obesity and the overweight.

16 43. The preamble to the Agreement clearly states that “TSI has acquired,
17 developed, licensed and/or otherwise owns all right, title and interest in and to certain
18 technology, inventions, trademarks, and know-how relating to Ingredient [...GSNP]
19 desires to market and sell dietary supplements containing Ingredient purchased from
20 TSI. TSI is willing to supply Ingredient to [GSNP] and to grant a license to practice
21 and utilize TSI’s technology, inventions, trademarks, and know-how, consistent with
22 the terms and conditions set forth in this agreement.”

23 44. Under the Agreement, paragraph 1.3, “Products shall mean any products
24 containing Ingredient as identified in Appendix B.” Appendix B of the Agreement
25 specifies the manner in which GSNP is required to distribute products containing
26 ATP. These products include Dietary Supplements including beverage mixes, ready
27 to drink (RTD) beverages, and liquid dietary supplements throughout the United
28 States and globally, by way of direct consumer sales, specialty markets, multi-level

1 marketing, mass marketing, membership clubs and in gyms, health food outlets and
2 running stores.

3 45. GSNP was granted under the terms of the non-exclusive license as stated
4 in the Agreement, paragraph 2, the right “to (a) use, sell and otherwise commercialize
5 Products.” Under this Agreement, GSNP was required to exclusively purchase ATP
6 from TSI for use in formulations containing ATP that were covered by any of the
7 claims of any of the patents in Appendix A of the Agreement.

8 46. GSNP has in the past formulated products (“Accused Products”) which
9 contain the Ingredient, ATP, the use of which by end users infringe the claims of
10 patents in Appendix A, and upon information and belief, continue to do so.

11 47. In an email communication with TSI President Larry Kolb on or about
12 October 7, 2010, GSNP President Brian Rubach acknowledged that he understood that
13 he and any third parties desiring to sell the Accused Products containing ATP would
14 be required to license the patents from TSI and purchase TSI’s PEAK ATP product.

15 48. In 2007, GSNP purchased 1 kilogram of PEAK ATP from TSI. In 2008,
16 GSNP purchased 1 kilogram of PEAK ATP from TSI. In 2009, GSNP purchased 2kg
17 PEAK ATP from TSI. In 2010, GSNP purchased 69kg PEAK ATP from TSI. In
18 2011, GSNP purchased 163kg PEAK ATP from TSI.

19 49. On August 22, 2011, GSNP advised TSI that “funds were tight,” and that
20 they would remit payment on past due invoices shortly.

21 50. In 2012, GSNP did not purchase any PEAK ATP from TSI. At this
22 point, TSI assumed that GSNP was no longer including ATP in its formulations.

23 51. In March of 2012, TSI’s final invoice for \$17,500 from July 2011
24 became current following installment payments from September 2011 through March
25 of 2012.

26 52. On October 29, 2012, TSI became aware that GSNP was still producing
27 Accused Products when Cheryl Powers of GSNP emailed TSI soliciting “a non-GMO
28 statement or certification for the following ingredients: ATP.”

53. Upon information and belief, GSNP has been and is knowingly buying and/or manufacturing and/or offering for sale and/or importing ATP and including it in Accused Products which it sells to third parties for resale to end-users/consumers.

54. By way of example and in no way as a limitation, upon information and belief, Third Party Defendant Apex Energetics, Inc. (“Apex”) and others purchased, and upon information and belief continue to purchase Accused Products from GSNP.

55. The sale of these non-licensed ATP-containing Accused Products to Apex and others constitutes a material breach of contract under the Agreement.

56. As a result of GSNP's breach of the Agreement, TSI has sustained and will continue to sustain damages.

SECOND COUNTERCLAIM

(Contributory Patent Infringement under 35 U.S.C. § 271(c))

57. TSI realleges and incorporates by reference each and every allegation set forth in paragraphs 37 through 56.

58. GSNP has had direct, firsthand knowledge of the TSI Patents, including U.S. Patent 7,629,329 issued on December 8, 2009 to Steve S. Lee et al. for “Method for Increasing Muscle Mass and Strength Through Administration of Adenosine Triphosphate,” U.S. Patent 7,671,038 entitled “Method of Therapeutic Treatments Including Human Immunodeficiency Virus (HIV) Disease and Other Conditions in a Human Host by Administering Adenine Nucleotides” issued on March 2, 2010, and U.S. Patent 6,723,737 for “Methods, Pharmaceutical and Therapeutic Compositions for Administering Adenosine,” issued on April 20, 2004.

59. Despite this knowledge, GSNP has, and upon information and belief continues to formulate Accused Products. The Accused Products are formulated, made, manufactured, shipped, distributed, advertised, offered for sale, and/or sold by the GSNP to third party resellers include ATP, that by virtue of their inclusion in the products and the manner in which they are consumed, infringe one or more claims of one or more of the TSI Patents.

1 60. The Accused Products were and are sold by third parties to end-users
2 with labels and advertising explaining the elements and essential elements of one or
3 more of the methods disclosed in the TSI Patents, and those labels and advertising
4 statements encourage, urge, and induce the Accused Products' end-users to purchase
5 and orally ingest the products to practice those methods, and end-users do practice
6 those methods. GSNP is aware of this labeling.

7 61. End-users of GSNP's Accused Products have taken, used, and orally
8 administered the ATP-containing Accused Products.

9 62. The third party resellers and end-users of GSNP's Accused Products are
10 direct infringers of one or more of the TSI Patents.

11 63. When end-users of the Accused Products consume the Accused Products,
12 they are practicing the methods disclosed in those claims and are therefore direct
13 infringers. GSNP has knowledge of the fact that the Accused Products, particularly as
14 administered, were used to infringe on one or more claims of the TSI Patents.

15 64. When third party resellers provide Accused Products to end-users, they
16 are practicing the methods disclosed in those claims and are therefore direct
17 infringers. GSNP has knowledge of the fact that the Accused Products, particularly as
18 administered, were and are used to infringe on one or more claims of the TSI Patents.

19 65. GSNP knowingly and willfully designed and formulated the Accused
20 Products so as to only be capable of infringing use in the United States.

21 66. GSNP is aware that the third party distribution of the Accused Products
22 for oral administration directly infringe the TSI Patents, yet has willfully and actively
23 encouraged distribution of the Accused Products to end-users. GSNP has therefore
24 specifically intended to cause these end-users to directly infringe the claimed methods
25 of these patents, and have in fact urged them to do so.

26 67. For example and without limitation, GSNP has had knowledge of the
27 '038 patent since at least October 3 2007. Beginning on October 2, 2007, Brian
28 Rubach, President of GSNP and Dr. Eliezer Rapaport had an exchange of confidential

1 information regarding the effects of ATP in particular formulations. On or about this
2 time, GSNP President Brian Rubach became aware of the existence of the TSI Patents
3 as a product of this communication.

4 68. On or about June 24, 2009, TSI and GSNP entered into the Agreement
5 discussed herein, which included the '737 and '329 patents in Appendix A.

6 69. GSNP was also put on notice of TSI's interest in the '329 and '038
7 patents as of December 13, 2012, when TSI's counsel sent a letter to GSNP advising
8 them of their infringement.

9 70. GSNP has brazenly and willfully decided to intentionally contribute to
10 the infringement of the TSI Patents despite knowledge of the patents' existence and
11 their knowledge of the Accused Products' infringements of the patents.

12 71. At a minimum, and in the alternative, GSNP willfully blinded themselves
13 to the infringing nature of the Accused Products' sales.

14 72. GSNP has not ceased their contribution to the of infringements by end-
15 users, despite their knowledge of the TSI Patents and their infringing activities with
16 respect to the TSI Patents.

17 73. As a result of GSNP's contributory infringement of the TSI Patents, TSI
18 has suffered damages and will continue to do so.

19 **THIRD COUNTERCLAIM**

20 **(Inducement of Patent Infringement under 35 U.S.C. § 271(b))**

21 74. TSI realleges and incorporates by reference each and every allegation set
22 forth in paragraphs 37 through 73.

23 75. GSNP has had direct, firsthand knowledge of the TSI Patents, including
24 U.S. Patent 7,629,329 issued on December 8, 2009 to Steve S. Lee et al. for "Method
25 for Increasing Muscle Mass and Strength Through Administration of Adenosine
26 Triphosphate," U.S. Patent 7,671,038 entitled "Method of Therapeutic Treatments
27 Including Human Immunodeficiency Virus (HIV) Disease and Other Conditions in a
28 Human Host by Administering Adenine Nucleotides" (issued on March 2, 2010), and

1 U.S. Patent 6,723,737 for “Methods, Pharmaceutical and Therapeutic Compositions
2 for Administering Adenosine,” issued on April 20, 2004.

3 76. For example and without limitation, GSNP has had knowledge of the
4 ‘038 patent since at least October 3 2007. Beginning on October 2, 2007, Brian
5 Rubach, President of GSNP and Dr. Eliezer Rapaport had an exchange of confidential
6 information regarding the effects of ATP in particular formulations. On or about this
7 time, GSNP President Brian Rubach became aware of the existence of the TSI Patents
8 as a product of this communication.

9 77. On or about June 24, 2009, TSI and GSNP entered into the Agreement
10 discussed herein, which included the ‘737 and ‘329 patents in Appendix A.

11 78. GSNP was also put on notice of TSI’s interest in the ‘329 and ‘038
12 patents as of December 13, 2012, when TSI’s counsel sent a letter to GSNP advising
13 them of their infringement.

14 79. Despite this knowledge, GSNP has, and upon information and belief
15 continues to formulate Accused Products to induce infringement of the TSI Patents.
16 The Accused Products are formulated, made, manufactured, shipped, distributed,
17 advertised, offered for sale, and/or sold by the GSNP to third party resellers include
18 ATP, that by virtue of their inclusion in the products and the manner in which they are
19 consumed, infringe one or more claims of one or more of the TSI Patents.

20 80. The Accused Products were and are sold by third parties to end-users
21 with labels and advertising explaining the elements and essential elements of one or
22 more of the methods disclosed in the TSI Patents, and those labels and advertising
23 statements encourage, urge, and induce the accused products' end-users to purchase
24 and orally ingest the products to practice those methods, and end-users do practice
25 those methods. GSNP is aware of this labeling.

26 81. End-users of GSNP’s Accused Products have taken, used, and orally
27 administered the ATP-containing Accused Products.
28

82. End-users of GSNP's Accused Products are direct infringers of one or more of the TSI Patents.

83. When end-users of the Accused Products orally administer the Accused Products, they are practicing the methods disclosed in those claims and are therefore direct infringers. GSNP has knowledge of the fact that the Accused Products, particularly as administered, were used to infringe on one or more claims of the TSI Patents.

84. GSNP is aware that the third party distribution of the Accused Products for oral administration directly infringe the TSI Patents, yet has willfully and actively encouraged distribution of the Accused Products to end-users.

85. GSNP knowingly and willfully designed and formulated the Accused Products so as to only be capable of infringing use in the United States.

86. GSNP has therefore specifically intended to cause these end-users to directly infringe the claimed methods of these patents, and have in fact urged them to do so.

87. GSNP has brazenly and willfully decided to intentionally induce the infringement the TSI Patents despite knowledge of the patents' existence and their knowledge of the Accused Products' infringements of the patents.

88. At a minimum, and in the alternative, GSNP willfully blinded themselves to the infringing nature of the Accused Products' sales.

89. GSNP has not ceased their inducements of infringements by end-users, despite their knowledge of the TSI Patents and their infringing activities with respect to the TSI Patents.

90. As a result of GSNP's inducement of infringement of the TSI Patents, TSI has suffered damages and will continue to do so.

PRAAYER FOR RELIEF

TSI Health Services, Inc. respectfully prays that the Court enter judgment as follows:

- 1 A. Enter judgment for TSI and against GSNP on GSNP’s complaint;
- 2 B. Enter judgment that GSNP has breached the Agreement with TSI;
- 3 C. Enter judgment that GSNP has infringed the TSI Patents in violation of
- 4 35 U.S.C. § 271 (b), and/or (c);
- 5 D. Enter orders enjoining GSNP, and its respective officers, agents,
- 6 servants, employees, and attorneys, and all persons in active concert or participation
- 7 with any of the foregoing, who receive actual notice of the orders by personal service
- 8 or otherwise, from infringing the TSI Patents in violation of 35 U.S.C. § 271(a) (b),
- 9 and/or (c);
- 10 E. To award TSI its respective damages in amounts sufficient to compensate
- 11 it for GSNP’s infringement of the TSI Patents, together with pre-judgment and post-
- 12 judgment interest and costs, pursuant to 35 U.S.C. § 284;
- 13 F. To declare this case to be “exceptional” under 35 U.S.C. § 285 and to
- 14 award TSI its attorney’s fees, expenses, and costs incurred in this action;
- 15 G. To declare GSNP’s infringement to be willful and award TSI treble
- 16 damages; and
- 17 H. To award TSI such other and further relief as this Court deems just and
- 18 proper.
- 19

20 **THIRD PARTY COMPLAINT AGAINST DEFENDANT APEX**

21 **ENERGETICS, INC.**

22 TSI hereby alleges as follows for its Third Party Complaint against Third Party

23 Defendant Apex Energetics, Inc. (“Apex”):

24 **NATURE OF THIS ACTION**

25 91. TSI (USA) Inc. f/k/a TSI Health Sciences, Inc. (hereafter “TSI”) is a

26 Montana corporation with a principal place of business at 305 S. 4th St. East,

27 Missoula, Montana.

28 ///

1 92. TSI is informed and believes that Apex Energetics, Inc. is a California
2 corporation with its principal place of business at 16592 Hale Ave., Irvine, CA 92606.

3
4 **JURISDICTION AND VENUE**

5 93. This patent infringement action arises under the patent laws of the United
6 States, Title 35 of the U.S. Code, section 1, *et seq.*

7 94. This Court has subject matter jurisdiction over this patent infringement
8 action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

9 95. This Court has personal jurisdiction over Apex because Apex is a
10 California corporation and the infringement occurred in California.

11 96. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and (c).

12 **NATURE OF THIS ACTION**

13 97. This is an action for patent infringement against Apex Energetics, Inc. for
14 patent infringement, as well as contributing and inducing the infringement of others
15 by through use of ATP-containing formulations which infringe TSI's Patents,
16 including U.S. Patent 7,629,329 issued on December 8, 2009 to Steve S. Lee et al. for
17 "Method for Increasing Muscle Mass and Strength Through Administration of
18 Adenosine Triphosphate," U.S. Patent 7,671,038 entitled "Method of Therapeutic
19 Treatments Including Human Immunodeficiency Virus (HIV) Disease and Other
20 Conditions in a Human Host by Administering Adenine Nucleotides" (issued on
21 March 2, 2010), and U.S. Patent 6,723,737 for "Methods, Pharmaceutical and
22 Therapeutic Compositions for Administering Adenosine," issued on April 20, 2004.

23 **FIRST CLAIM FOR RELIEF**

24 **AGAINST THIRD PARTY DEFENDANT APEX**

25 **(Patent Infringement Under 35 U.S.C. § 271(a))**

26 98. TSI realleges and incorporates by reference each and every allegation set
27 forth in paragraphs 37 through 97.

28 ///

1 99. Apex has, and upon information and belief continues, to purchase liquid
2 nutraceutical formulations containing ATP (the “Accused Products”) from GSNP for
3 resale to end-users.

4 100. Apex distributes Accused Products to other retailers and/or directly sells
5 these Accused Products to end-users for oral administration.

6 101. A true and correct copy of a screenshot showing of an example Accused
7 Product sold by Apex call “Apex Energetics Nitric Balance K-62” is attached hereto
8 as Exhibit “F”.

9 102. The administration and distribution of the Accused Products by Apex to
10 end-users for oral consumption constitutes infringement of at least one element of at
11 least one of the claims of the TSI Patents.

12 103. As a result of Apex’s infringement of the TSI Patents, TSI has suffered
13 damages and will continue to do so.

14 **SECOND CLAIM FOR RELIEF**

15 **AGAINST THIRD PARTY DEFENDANT APEX**

16 **(Contributory Patent Infringement under 35 U.S.C. § 271(c))**

17 104. TSI realleges and incorporates by reference each and every allegation set
18 forth in paragraphs 37 through 103.

19 105. On or about June 16, 2011, TSI attempted to have Apex sign a licensing
20 agreement for the purchase and distribution of Accused Products, which Apex
21 refused. Following TSI’s attempt to engage in a licensing agreement Apex by way of
22 GSNP, Apex has direct, firsthand knowledge of the ‘737 and ‘329 Patents.

23 106. Upon information and belief, Apex is, and has been aware of the ‘038
24 patent.

25 107. The Accused Products are formulated, made, manufactured, shipped,
26 distributed, advertised, offered for sale, and/or sold by Apex to end users who infringe
27 one or more claims of one or more of the TSI Patents.

28 ///

1 108. The Accused Products were and are sold to end-users with labels and
2 advertising explaining the elements and essential elements of one or more of the
3 methods disclosed in the TSI Patents, and those labels and advertising statements
4 encourage, urge, and induce the end-users to purchase and orally ingest the products
5 to practice those methods, and end-users do practice those methods.

6 109. When end-users orally administer the Accused Products, they are
7 practicing the methods disclosed in those claims and are therefore direct infringers.
8 Apex has knowledge of the fact that the Accused Products, particularly as
9 administered, were and are used to infringe on one or more claims of the TSI Patents.

10 110. Apex has brazenly and willfully decided to intentionally contribute to the
11 infringement of the TSI Patents despite knowledge of the patents' existence and their
12 knowledge of the Accused Products' infringements of the patents.

13 111. At a minimum, and in the alternative, Apex willfully blinded themselves
14 to the infringing nature of the Accused Products' sales.

15 112. Apex has not ceased their contribution to the infringements by end-users,
16 despite their knowledge of the TSI Patents and their infringing activities with respect
17 to the TSI Patents.

18 113. As a result of Apex's contributory infringement of the TSI Patents, TSI
19 has suffered damages and will continue to do so.

20 **THIRD CLAIM FOR RELIEF**

21 **AGAINST THIRD PARTY DEFENDANT APEX**

22 **(Inducement of Patent Infringement under 35 U.S.C. § 271(b))**

23 114. TSI realleges and incorporates by reference each and every allegation set
24 forth in paragraphs 37 through 113.

25 115. Following TSI's attempt to engage in a licensing agreement Apex by way
26 of GSNP, Apex has direct, firsthand knowledge of the '737 and '329 Patents.

27 116. Upon information and belief, Apex is, and has been aware of the '038
28 patent.

1 117. The Accused Products were and are sold by Apex with labels and
2 advertising explaining the elements and essential elements of one or more of the
3 methods disclosed in the TSI Patents, and those labels and advertising statements
4 encourage, urge, and induce the accused products' end-users to purchase and orally
5 ingest the products to practice those methods, and end-users do practice those
6 methods.

7 118. End-users have taken, used, and orally administered the ATP-containing
8 Accused Products.

9 119. End-users of the Accused Products are direct infringers of one or more of
10 the TSI Patents.

11 120. Apex has knowledge of the fact that the Accused Products, particularly as
12 administered, were and are used to infringe on one or more claims of the TSI Patents.

13 121. Apex is aware that the distribution of the Accused Products for oral
14 administration directly infringes the TSI Patents, yet has willfully and actively
15 distributed the Accused Products to end-users.

16 122. Apex has specifically intended to cause the end-users to directly infringe
17 the claimed methods of these patents, and have in fact urged them to do so.

18 123. Apex has brazenly and willfully decided to intentionally induce the
19 infringement the TSI Patents despite knowledge of the patents' existence and their
20 knowledge of the Accused Products' infringements of the patents.

21 124. At a minimum, and in the alternative, Apex willfully blinded themselves
22 to the infringing nature of the Accused Products' sales.

23 125. Apex has not ceased their inducements of infringements by end-users,
24 despite their knowledge of the TSI Patents and their infringing activities with respect
25 to the TSI Patents.

26 126. As a result of Apex's inducement of infringement of the TSI Patents, TSI
27 has suffered damages and will continue to do so.

28 ///

1 **PRAYER FOR RELIEF**

2 TSI Health Services, Inc. respectfully requests that this Court:

3 A. Enter judgment that Apex has infringed the TSI Patents in violation of 35
4 U.S.C. § 271(a), (b), and/or (c);

5 B. Enter orders enjoining Apex, and its respective officers, agents, servants,
6 employees, and attorneys, and all persons in active concert or participation with any of
7 the foregoing, who receive actual notice of the orders by personal service or
8 otherwise, from infringing the TSI Patents in violation of 35 U.S.C. § 271(a) (b),
9 and/or (c);

10 C. To award TSI its respective damages in amounts sufficient to compensate
11 it for Apex's infringement of the TSI Patents, together with pre-judgment and post-
12 judgment interest and costs, pursuant to 35 U.S.C. § 284;

13 D. To declare this case to be "exceptional" under 35 U.S.C. § 285 and to
14 award TSI its attorney's fees, expenses, and costs incurred in this action;

15 E. To declare GSNP's infringement to be willful and award TSI treble
16 damages; and

17 F. To award TSI such other and further relief as this Court deems just and
18 proper.

19
20 Dated: April 9, 2013

JACZKO LAW GROUP APC

21 DAVIS, BROWN, KOEHN, SHORS &
22 ROBERTS. PC

23
24 By: /s/ J. Christopher Jaczko
J. Christopher Jaczko

25 Attorneys for Defendant,
26 Counterclaimant and Third-Party
27 Plaintiff
28 TSI HEALTH SCIENCES. INC.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: April 9, 2013

DAVIS, BROWN, KOEHN, SHORS &
ROBERTS. PC

Attorneys for Defendant,
Counterclaimant and Third-Party
Plaintiff
TSI HEALTH SCIENCES, INC.

Answer, Counterclaim, Third-Party
Complaint